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March 8, 2011

PUBLIC VERSION

ENTERED
Office of Proceedings
MAR 8 2011
Part of
Public Record

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

Re: Finance Docket No. 35387
Ag Processing Inc A Cooperative – Petition for Declaratory Order

Dear Ms. Brown:

Enclosed for filing is a signed original and 10 copies of a **PUBLIC VERSION** of Reply of Petitioners to the Motion for Dismissal by Norfolk Southern Railway Company in the above-captioned case.

Please return the extra copy, date-stamped, with our messenger. Thank you.

Sincerely

Andrew P. Goldstein
Attorney for
Ag Processing Inc A Cooperative, et al.

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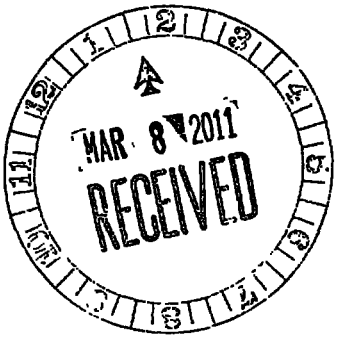
PUBLIC VERSION

ORIGINAL



BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35387

AG PROCESSING INC A COOPERATIVE – PETITION FOR DECLARATORY ORDER

REPLY OF PETITIONERS TO THE MOTION FOR DISMISSAL BY NORFOLK SOUTHERN RAILWAY COMPANY

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Attorneys for
Ag Processing Inc A Cooperative, et al.

Dated: March 8, 2011

BACKGROUND

This case involves a request for a declaratory order by Ag Processing Inc a Cooperative, Bunge North America, Inc., Archer Daniels Midland Company, Perdue Agribusiness, Incorporated, and Louis Dreyfus Corporation (collectively "Petitioners" or otherwise called by appropriate short titles) under 5 U.S.C. § 554(e), which states that the Board "may issue a declaratory order to terminate a controversy or remove uncertainty."

The request for the institution of a declaratory order proceeding arises from tariff amendments first published by NS to be effective July 14, 2010.[1] This Initial Tariff alarmed Petitioners because it was the first time that any railroad had published a tariff expressly making weather conditions, such as snow and ice, an attributable cause for an overweight car *when the snow and ice accumulation occurred after the car had been loaded within proper weight limits and tendered to NS or its connections, which held the car while the snow and ice accumulated.*

NS changed the Initial Tariff after the Initial Petition for Declaratory Order was filed. See Item 5000, NS 8002-A, attached to the NS Motion ("Present Tariff"). In the Present Tariff Preamble, it retained the new language that an "overloaded car ... includes overloaded cars attributable to weather conditions." It also made changes to Section D of the tariff granting limited relief from the tariff's overload penalties, demurrage penalties, switching charges, and weighing charges "[w]here an overloaded condition is due, in part, to weather (rain, snow, ice etc.)." In such instances, if the consignor or owner of the shipment provides a certified weight certificate showing the weight of the shipment was below the stenciled load limit of the car and such certificate is provided within 24 hours

[1] Item 5, Tariff NS 8002-A (the "Initial Tariff"), Appendix A to the Second Amended Petition for Declaratory Order.

of notification of overload, and the consignor or owner of the shipment fully unloads the car or otherwise eliminates the overload condition at its expense within five days. In such instances, the consignor or owner is relieved of all overload charges during the described five-day period. If the described conditions are not met, all applicable railroad charges shall apply and will be assessed after the end of the fifth day.

Following receipt of the Present Tariff, Petitioners proposed mediation under the Board's auspices and NS agreed. However, mediation did not prove fruitful. When mediation was terminated, NS filed its Motion to Dismiss.

Attached to Norfolk Southern's Motion to Dismiss is the verified statement of Rush Bailey, an NS official. Mr. Bailey's verified statement discloses to Petitioners for the first time (and to the public) that NS has a "secret" protocol for determining the maximum permissible weight of a freight car beyond the weight limit stenciled on the car. In other words, if the stenciled gross weight limit of a car is, for example, 204,000 pounds, the "secret" NS protocol may state that the car will not be deemed overweight unless its gross weight exceeds, for instance, 208,000 pounds.[2]

ARGUMENT

A. Legal Standards

As the Board repeatedly has held, motions to dismiss proceedings are disfavored. The Board stated in *North America Freight Car Ass'n. v. BNSF*, STB Docket No. 42060 (Sub-No. 1):

> Granting a motion to dismiss requires that all factors be viewed in the light most favorable to complainant. Plus, motions to dismiss prior to the submission of evidence are generally denied, to insure that participants have a full and

[2] Outside counsel for Petitioners have received an unredacted "highly confidential" copy of the Bailey VS. The hypothetical numbers used here are not taken from either version of the Bailey VS.

> fair opportunity to meet their burden of proof. *National Grain and Feed Ass'n. v. Burlington N. R. R.*, Docket No. 40169, slip op. at 4 (ICC served June 1, 1990).

Decision served August 13, 2004, at 9. See also *State of Montana v. BNSF Railway Company*, STB Docket No. 42124 (slip op. at 3, February 16, 2011) ("Motions to dismiss are generally disfavored and are rarely granted").

B. Summary Argument

The arguments NS makes for dismissal disregard the foregoing precedents and are legally deficient in other respects. For the most part, NS does not use its Motion to Dismiss to argue that, under no circumstances could Petitioners be entitled to relief, which is the applicable standard for such motions. Rather, it attempts to argue that, on the merits, its tariff change is reasonable. Petitioners disagree, but would also point out that it is a misuse of motions to dismiss for railroads to use them for merits arguments, thus forcing shippers to respond prior to discovery and frequently on an accelerated schedule. However, because NS has relied upon a merits argument, Petitioners are obliged to respond in kind.

NS argues that there is no controversy, which is nonsense. First of all, NS voluntarily entered into mediation of its "dispute" with Petitioners. NS would not have undertaken mediation in the absence of a controversy.

There are different ways to approach overloads. Norfolk Southern has infused its overload rules with uncertainty. Its primary suggestion is that shippers resort to underloading every car during winter months to meet their alleged burden of taking all "reasonable" steps to avoid an interruption of a car's movement due to snow and ice.

According to Norfolk Southern's view of the parties' relative responsibilities, NS has none and the shipper bears all. The NS suggestion that shippers under-load every car during winter months, and pay a full carload rate nevertheless, creates a controversy each time a shipper loads a car. The controversy arises because the shipper is forced to choose between under-loading the car, and thus paying for transportation which NS is not providing, or loading the car to its stenciled weight and paying for overloads that occur from conditions not within the shipper's control.

NS also argues that there is no controversy because it has not actually imposed penalty charges as to any cars shipped by Petitioners. This is evidently a ripeness argument for dismissal, but it is unavailing. If it is potentially unreasonable for NS to refuse to remove any snow or ice itself, and to force shippers to perform this service or else light-load their cars all winter, shippers are not required to wait till the full force of such burdens and costs is experienced in order to invoke regulatory recourse. A party "need not wait for the axe to fall before seeking" regulatory relief. *Western State University of Southern California v. American Bar Association*, 301 F. Supp. 2nd 1129, 1134 (U.S.D.C. C.D. CA, 2004). The Tariff and the resulting controversy over the reasonableness of the new NS rules exists now.

To obtain dismissal for lack of controversy, NS would have to demonstrate that the challenged tariff provisions could not adversely impact Petitioners. This might be done, inasmuch as their cars are tank cars and covered hoppers, and NS seems to regard open top cars as the main source of weight problems, but NS has refused to narrow the scope of the tariff change to exclude tank and covered hopper cars.

The same set of events also create "uncertainty" within the meaning of 5 U.S.C. § 554(c). Inherently, a shipper cannot determine beforehand whether its light-loading of a car will avoid an "overload" problem or instead simply deprive the shipper of the use of freight capacity for which the shipper pays a per-car rate. This uncertainty is compounded by the NS "secret protocol" which allows cars to be loaded in excess of the stenciled weight, but to an extent withheld from the shipper. Norfolk Southern's construction of its own Tariff does not advance its argument, but simply illustrates how the subject Tariff meets the standards of 5 U.S.C. § 554(c).

Finally, NS argues for dismissal on the ground that its latest tariff is less objectionable than former versions, and that the addition of a "safe harbor" feature should mitigate shipper concerns. Even if that were true, shipper concerns have not been eliminated. In any event, allowing railroads to obtain dismissal of shipper challenge by publishing objectionable tariff provisions, and then replacing them with slightly less objectionable provisions would give railroads the ability and the incentive to immunize their own actions from regulatory scrutiny. They could simply publish even more abusive provisions first, then substitute less abusive provisions and argue that their two-step process requires dismissal of any shipper challenge to the final product.

C. There Is In Fact A Controversy

NS argues that there is no "controversy" because none of the Petitioners have been penalized under the Tariff. NS Motion at 2, 7, 8. NS misconceives the concept of "controversy." Section 554(d) of the Administrative Procedure Act does not require a dispute over the payment of money through a penalty assessment or otherwise. An agency may consider other factors in determining whether to grant declaratory order re-

lief. *Climax Molybdenum Company v. Secretary of Labor*, 702 F.2nd 447, 451-52 (10th Circuit, 1983).

In this case, NS bases its assertion that there is no controversy on the absence of any fines assessed against Petitioners pursuant to the Tariff. But we know now that NS has a secret protocol, under which it has controlling weight limits that deviate from those stenciled on the car or known to any Petitioners.[3] For all Petitioners know, the "secret protocol" of NS, adding to the permissible stenciled weight of a car, is largely or entirely responsible for the fact that Petitioners have received no notice of a Tariff violation occurring because of snow or ice accumulated while a car is in the possession of NS or its connections. Alternatively, NS may have focused in the earliest phase of implementation of its tariff on open-top railcars not used by Petitioners.

Further, NS agreed to enter into mediation under the auspices of the Board. A party believing and asserting that there is no controversy is highly unlikely to agree to try to resolve its adverse issues with the other party, as NS did.

Petitioners wish to make it clear that there may be shipper fault if a car is loaded when heavy accumulations of snow and ice already are known to be present on the car and shippers nevertheless load the car with lading that brings the gross loaded weight of the car over the stenciled weight limit, thereby producing an overload. However, if a car is loaded to its stenciled limit, or with less lading to take account of snow and ice already on the car at the time of loading, so that the stenciled gross permissible weight of the car is not exceeded, any additional weight due to snow and ice accumulation after NS takes custody of the car is not the responsibility of the shipper. "After the loading has taken

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[3] Because outside counsel cannot disclose the secret protocol to Petitioners, Petitioners cannot at this time offer any proof that their loads were susceptible to overload citation under the Tariff when its cars received snow and ice while in the possession of NS or its connections.

place, the shipment is under the control of the railroad and subject to the vagaries of wind, weather.... Once the movement is in transit, there is nothing the shipper can do to comply" with tariff provisions governing loaded freight. *Arkansas Electric Cooperative – Petition for Declaratory* Order, F.D. 35305 (March 3, 2011). Language in the NS Tariff attempting to make shippers responsible for the weight of snow and ice added after NS has the car is totally unreasonable.

D. Uncertainty Exists

While this proceeding is not a "complaint," it is very close to it.[4] Petitioners' pleadings demonstrate that the Present Tariff not only creates uncertainty but is unlawful. The imposition of overload penalties turns on a secret protocol disclosed by NS Witness Bailey (under seal) which allows NS to assess or waive penalties at its discretion against shippers who may or may not violate Norfolk Southern's unspoken rules for overloads. Those practices by NS violate the requirement that its tariff provisions, including rules such as actual weight limits, be made public before they can be binding on shippers. By concealing its overweight limits, NS creates gross uncertainty regarding the extent to which shippers may load cars.

In this proceeding, NS admits that its secret weight limits "sometimes" exceed its stenciled weight limits (NS Motion at 3). NS argues (Motion at 10-11) that because neither Petitioners nor NS can anticipate weather conditions that will prevail between the time a car is tendered to NS or one of its connections and delivered, it is up to a shipper to "exercise foresight and control the loading of the car to insure that it stays in compli-

[4] Petitioners paid a filing fee of $1,000, which applies to "declaratory orders in the nature of a complaint." The Board has recognized that the high filing fees for a non-rate complaint as so high as to deter the filling of a complaint and steer shippers toward use of the less expensive declaratory process. Ex Parte No. 542 (Sub-No. 18), *Regulations Governing Fees for Services* (served February 15, 2011).

ance." The NS argument asserts that NS "cannot control how close to the weight restriction those cars are loaded; Petitioners can."[5] NS continues: "Petitioners know their commodities and the commodities' properties for absorbing moisture. Petitioners therefore know how close to the stenciled weight restriction they can load the car and avoid risking the car becoming overweight due in part to weather that might be encountered in route." (Motion at 10-11).

The argument that Petitioners must take into consideration their "commodities' properties for absorbing moisture" is the reddest of red herrings. As NS knows, Petitioners ship in covered hopper cars and tank cars, both of which are completely sealed at the time of loading. Unless parts of the cars are damaged during transportation, no moisture penetrates to the cars' interiors. Moisture from ice or snow clearly may seep into the loads placed in open cars, such as gondolas and open hoppers, where they conceivably do add to the weight of the car. But if NS believes that the absorption of moisture into the commodities carried in a particular type of car are cause of overloads, it should direct its overload penalties at such cars. To impose penalties on cars which cannot absorb moisture is illogical and uncertain.

Petitioners agree that they "control the weight of the car" before it is tendered to NS or a connecting railroad, but not afterward. NS suggests that Petitioners "can control the weight by not loading as closely as possible to the weight limit when there is a risk that snow, ice, or weather will put the car over the rate restriction." *Id.* NS evidently believes that from November through March, Petitioners should light-load all tank and cov-

[5] NS asserts that Petitioners "do not dispute those facts." In the first place, this reply is Petitioners' first opportunity to do so, and there has been no opportunity for discovery. Second, if Petitioner "cannot control how close to the weight restrictions the cars are loaded" we must first ask which weight restrictions NS means; the stenciled limits or its secret, internal limits? Obviously, Petitioners cannot control the relationship between the stenciled weight limits and the secret NS weight limits.

ered hopper cars to make sure that if snow or ice accumulates on those cars while on NS the cars will not be overweight, or else accept the burdens and costs of snow removal from cars in transit.

Putting aside for the moment that Petitioners do not know the real NS overweight limit, because they are in the secret protocol, the NS argument, if accepted, would cause Petitioners to under-load all cars in the winter to make sure that the secret NS weight limits are not exceeded. Thousands of cars thus would get shipped under-loaded just in case they might encounter snow or ice. This extreme measure will cost shippers dearly.

For example, to light-load a car by 5,000 pounds, which is the equivalent of two inches of snow and ice on the top of a covered hopper car, would cause Petitioners to pay freight charges for up to 2.5 tons of lading that cannot be loaded in the car in anticipation of a snow or ice storm that may or may not occur. Devlin V.S. Plus, NS is preventing its customers from utilizing the full carload freight rate that it offers.

Contrary to the NS claim (Motion at 5) that other railroads' tariffs hold the customer responsible for overweight cars "regardless of the cause," even a cursory reading of those tariffs (appended to NS motion) clearly reveals that they are inapplicable to overweights due to snow and ice accumulated after car is tendered to a railroad. Each of the railroad tariffs provided by NS applies when a car is "overloaded," without any provision for the inclusion of subsequent snow or ice accumulations in the term "overloaded." On its face, the term "overloaded" refers to the "loading" of the car, which obviously means the placement of lading in the car by the shipper. Snow and ice are not lading "loaded" in a car. An overload can occur only when the shipper places enough lading in the car to exceed its stenciled maximum weight.

Not one of the other railroad tariffs cited by NS contains a definition of "over-weight" that includes snow, ice, or other weather-related conditions. Thus, each of those other railroad tariffs relied upon by NS is inapposite because, unlike the NS Tariff which specifically makes snow and ice or other weather conditions elements of an overload, the other railroad tariffs invoked by NS do not.

This brings up the question of whether a shipper which did not cause an "over-load", and does not know what weight limit – the stenciled limit or the "secret" limit – governs its shipments can lawfully be held liable for "overloads" as defined in the Present Tariff. Despite the fact that overloads can cause problems, facing those problems when they occur on the lines of NS is the responsibility of NS. NS clears its own tracks of ice and snow; it clears locomotives, secondary tracks and shipper switches of ice and snow. It does not require customers located on common carrier trackage to clear ice and snow from that trackage, or from side tracks on railroad property.

Norfolk Southern argues that "[b]ecause the customer controls the weight of the car, placing the burden for overweight rail cars on the customers has been customary in the industry," See Motion at 11, citing the above-mentioned tariffs of other railroads. Those tariffs, however, do not place on the shipper the burden of overweight rail cars due to snow or ice accumulated while on the lines of an originating or connecting carrier.

Norfolk Southern extols the benefits of Part D to the Present Tariff as providing an unprecedented form of relief to shippers; namely, if the shipper can provide certified weight scale results demonstrating that the car was within weight limits at origin, it is re-lieved of charges related to the "overload" for five days. If the overload condition is ei-ther remedied by the customer or remedied naturally within five days, NS says it will

waive all railroad charges provided for in NS Tariff 8002-A, Item 5000. If it is not remedied within five days, NS will assess applicable charges incurred after the fifth day. Motion at 12.

In order to avail itself of this provision, a shipper charged by NS with making an overload shipment must not merely provide proof that the car was not overloaded (as measured by the stenciled weight limit) when shipped, but, if overloaded due to any cause, must also remedy the overload condition within five days. The attached Verified Statement of Gary Devlin explains the costs associated with meeting the car unloading demands of NS. If those demands are met within five days, the expenses to the shipper are lower than if the tariff requirements are not met within five days. Either way, however, the shipper must pay to have a certain amount of lading removed from the car. Ironically, because the shipper does not know the NS secret weight limit protocol for the car, some or all of the lading it removes may well be unnecessary if the higher secret NS weight limits are applied.

Norfolk Southern contends (Motion at 8) that no controversy arises from paragraph D of the Tariff because it has never been applied to any petitioner, saying"[i]t is very unlikely that Part D would ever apply to petitioners because weather overloads are typically not experienced by tank cars and covered hopper cars," and it cites *Chelsea Prop. Owners – Pet. for Declaratory Order – Highline,* STB FD 34259 (November 27, 2002) *and Pet. of Nebkota Ry., and West Plains Co. for Declaratory Order*, FD 35352 (April 28, 2010) as authority for the alleged absence of "uncertainty." Although it is true that overloads are not typically experienced by tank cars and covered hoppers, these decisions are inapposite.

In *Chelsea*, the petitioner wanted to Board to determine its jurisdiction and the potential for illegality should a rail line be abandoned, alleging that the City had submitted bids to host the Olympics which would require the abandonment. The City, however, stated that it had not decided and was still reviewing studies on whether to sever the rail line from the national rail system. In *Nebkota*, the Board denied the petition for declaratory order because the grounds cited for declaratory relief had ceased to exist. The petitioners there were concerned with trackage rights and a haulage agreement they had with a rail line that would be acquired by a new company. The new company and the existing carrier replied that the trackage rights would continue and the haulage agreement was not being assigned to the new company.

Neither case addresses the uncertainty that follows when there is a published tariff, a document used by NS to prescribe the behavior of its customers. There is no uncertainty about whether the NS Tariff exists, in contrast to the lack of certainty pointed out by the Board in the two cases cited by NS.

The NS secret weight limits have another invidious effect. According to the Highly Confidential statement of Rush Bailey (Exhibit B to Mr. Bailey's Verified Statement), some cars moving only on NS are allowed an additional _____ pounds, or ___ tons, over the stenciled weight in some instances. If the car is safe to handle when loaded with _____ pounds more than the stenciled weight, it is a waste of carrying capacity for NS to limit the load to the stenciled weight. It should be remembered that NS is charging per car rates, and by not allowing a shipper to load a car to its full, safe capacity, NS is overcharging or underserving its customers.

Not all internal, secret, NS weights are as generously above the stenciled weight limit as is the case for a _____ pound stenciled car identified in the Bailey Verified Statement. The NS internal weights exceed the stenciled weights by varying amounts, in _____, and differ depending on whether the shipment has a connection to a carrier that allows its own, fixed weight limit in excess of a stenciled weight that is different from the NS weight limit.

NS gives as its reason for withholding internal, secret weight limits from its customers the need for "privacy of NS' internal weight restrictions, as customers would tend to cut it even closer or load in excess of the stenciled weight limit of the car if they were aware of these internal weight tolerances." V.S. Bailey, p. 1. However, customers of NS are entitled to load their cars to the very limit of the stenciled gross weight, and there is nothing wrong with their "cutting it close." In fact, if shippers did not take advantage of the full stenciled weight of the car, up to the last pound, they would be penalizing themselves or their consignees because they are paying for an entire car load. NS has no business in attempting to deter its customers from taking advantage of the weights they are entitled to use. In fact, customers of NS should not be bound by the stenciled weight when NS recognizes undisclosed weight limits in excess of the stenciled weight that can safely be carried in the car.

CONCLUSION

Norfolk Southern has not met its steep burden for showing that the disfavored act of dismissal is warranted. There is both "controversy" and "uncertainty" regarding its tariff.

Moreover, the institution of a declaratory order proceeding would be in the public interest. To our knowledge, the NS Tariff represents the first effort by a major railroad to impose overload penalties after a shipper has loaded a car in compliance with the stenciled weight when the car becomes overweight solely because of snow or ice accumulated on the car while in the possession of NS or its connections. Where, as here, the issue is one of first impression, there is all the more reason to deny the defendant railroads' dismissal motion. See *National Grain and Feed Ass'n v. BNSF, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply of Petitioners to the Motion for Dismissal by Norfolk Southern Railway Company has, this 8th day of March, 2011 been served on counsel for Norfolk Southern both electronically and by first-class mail.

Andrew P. Goldstein

Andrew P. Goldstein

VERIFIED STATEMENT

OF

GARY J. DEVLIN

My name is Gary J. Devlin. I am Director Rail Service for Ag Processing Inc a Cooperative ("Ag Processing"). My duties entail the analysis of freight rates, including those published by Norfolk Southern Railway.

The Motion to Dismiss filed by Norfolk Southern suggests that shippers should light-load cars at any time of the year when snow, ice, or moisture can be anticipated. NS argues that shippers should light-load cars, so that snow, ice, or moisture will not accumulate on the cars during transportation, which according to the NS Tariff, would place the car in an overload status. This proposal is like forcing shippers to play roulette, having no more accurate knowledge of where the ball will fall than where and when snow or rain may fall over the route of the car's movement, which is likely to be upwards of 1,000 miles. Light-loading the car as suggested by NS is a very costly gamble.

One of the movements Ag Processing makes via NS involves the transportation of soybean meal from Chicago to a Georgia destination. The freight rate for the movement of a railcar of soybean meal to this Georgia destination averages $4,380[1] per car. If the car is light-loaded by 5,000 pounds (the equivalent of 2 inches of ice), the dead freight or "air" which we pay to ship would otherwise accommodate 2.5 tons of soybean meal.

Dead freight on this typical car would be calculated as follows: if you do not light-load a car and you use an average of 111 tons of soybean meal per car, freight charges for this move are $39.46 per ton ($4,380 ÷ 111 = $39.46). If you light-load the

[1] Rate is an average of the private and system car rates for cars routed via NS from Chicago to Leslie Desoto, GA

car by 5,000 pounds, or 2.5 tons, the shipper can only load the car with 108.5 tons of product. In this light-load scenario, freight charges are $40.37 per ton versus $39.46, resulting in an increased per ton cost of $0.91. Dead freight in the light-load circumstances would cost the shipper $98.74 per car ($0.91 x 108.5 tons). Additionally, once the shipper has light-loaded roughly 43 cars by 2.5 tons each, the shipper now has 107.5 tons of product, or roughly one railcar worth of product, which could not be loaded in the previous 43 cars, which now must move in an additional railcar at a freight rate of $4,380.

The NS Tariff requires shippers to partially unload cars deemed "overweight" in order to avoid the payment of penalties and other charges. See Item 5000. To "remedy an overload condition," would require the shipper to remove sufficient lading from the car to bring it into compliance with the NS Tariff. The cost of performing these tasks on NS property is difficult to state with certainty. First, shippers or a shipper's contractor cannot simply drive onto NS property and remove lading from a car. Second, cost depends on the charges of the local contractor who will have to be hired to remove lading. As the NS can hold the car at any point on the route, finding a qualified contractor that can reduce the lading of a railcar at any point on the NS could be very difficult.

Third, the shipper will incur freight and handling charges for moving the removed lading back into a marketing position, presumably to be delivered to the consignee. Once lading is removed, the shipper is left with two partial loads on its hands; the original car, now reduced in weight, and the container with the commodity removed from the original car. Based on my years of experience with Ag Processing, I estimate that the cost of removing sufficient lading from the car to bring it into compliance with the NS Tariff will

cost a minimum of $800 to $1,000 per car, plus the additional transportation or disposal costs related to the disposition of the removed lading.

For Ag Processing, the NS Tariff imposes a choice between two sets of costs and burdens, based on weather conditions over which we have no control.

VERIFICATION

I hereby certify that the foregoing statements are true and accurate to the best of my belief and knowledge.

Gary J. Devlin

GENERAL NOTARY - State of Nebraska
LARRY J. STEIER
My Comm. Exp. March 12, 2013

Notary Public

My commission expires March 12, 2013

Devlin Verified Statement.doc